Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

(2)

No. 91-280

In The

Supreme Court of the United States

October Term, 1991

MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Do cross petitioners raise any issues which are appropriate for consideration by certiorari.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. amicus curiae[1]

---

[1] The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
THE CROSS PETITIONERS CITE NO BASIS FOR GRANTING CERTIORARI OVER PLAINTIFF'S FIRST AMENDMENT CLAIMS	4
THE CROSS PETITIONERS RAISE NO ISSUE WITH RESPECT TO QUALIFIED IMMUNITY WHICH WOULD JUSTIFY GRANTING THE CROSS PETITION FOR WRIT OF CERTIORARI	4
THE CROSS PETITIONERS HAVE NOT ASSERTED ANY BASIS TO GRANT THE CROSS PETITION ON THE ISSUE OF CAUSATION	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 6

Rizzo v. Goode, 423 U.S. 362 (1976) 6

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980), *cert denied* 449 U.S. 1016 (1980) 6

OTHER AUTHORITIES:

First Amendment to the Constitution of the United States 2, 4, 5

Fourteenth Amendment to the Constitution of the United States 2, 3

28 U.S.C. Sec. 1254(1) 2

42 U.S.C. Sec. 1983 3

No. 91-280

In The

Supreme Court of the United States

October Term, 1991

MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.

Respondent herein, Raymon J. Melton[2], respectfully prays that the court deny the cross petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

[2] Petitioner in Case No. 91-29, and respondent in case nos. 91-280, 91-281, 91-304.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920[3]. This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. pp. 50-52. The panel decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City,* and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This court granted an extension to file the instant petition for writ of certiorari until July 2, 1991, on which date the petition was filed. The respondent filed it's cross petition for writ of certiorari on August 5, 1991. The corrected petition was received by the petitioners on August 26, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the First and 14th Amendments to the Constitution of the United States. The First Amendment provides:

---

[3] A copy of this opinion is included at App. 1 of Petitioner's Appendix to the petition in Case No. 91-29. Hereinafter, reference to the appendix to Case No. 91-29 shall be referred to as App. ___.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 14th Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are implemented by 42 U.S.C. Sec. 1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As noted above, the cross-petitioner's application for a writ of certiorari is one of four pending cases. The factual background to this case is clearly set forth in the

petition for certiorari filed by Raymon J. Melton in Case No. 91-29.

REASONS FOR DENYING THE WRIT

THE CROSS PETITIONERS CITE NO BASIS FOR GRANTING CERTIORARI OVER PLAINTIFF'S FIRST AMENDMENT CLAIMS

With respect to the First Amendment claim, the Tenth Circuit bifurcated plaintiff's theories. That is, the Tenth Circuit made distinctions in the causes of action regarding the plaintiff's First Amendment claims. They recognized two separate protected activities. The first was the right to testify at trial. The second was the right to communicate with defense counsel.

The court remanded the first issue, relating to the claim of testifying at trial, for the purpose of properly instructing the jury. This issue was sc well established that the court determined that good faith immunity would not apply to the defendants with regard to this claim.

With respect to the second issue, relating to communicating with defense counsel, the court below affirmed the verdict as against the City of Oklahoma City. The court ruled that qualified immunity applied to the claims against them in their individual capacities.

Cross petitioners' first basis for this court granting the writ is that the court erred in remanding this case against these individual defendants on the trial testimony

issue[4]. They urge that the evidence does not support such a claim. However, as the court below noted, there is sufficient evidence to justify submitting this matter to a jury. In this regard, the panel below noted that this was an appropriate issue for the jury, App. p. 67-68.

Accordingly, the cross petitioners fail to identify any basis for this court granting the extraordinary writ of certiorari. Accordingly, the petition should be denied.

THE CROSS PETITIONERS RAISE NO ISSUE WITH RESPECT TO QUALIFIED IMMUNITY WHICH WOULD JUSTIFY GRANTING THE CROSS PETITION FOR WRIT OF CERTIORARI

Cross petitioners assert that certiorari should be granted on the issue of qualified immunity with respect to (a) the claim for denial of procedural due process in continued employment, (b) the claim for denial due process as to the liberty interest claim. However, the Tenth Circuit dismissed these claims. The issue of qualified immunity only comes into play on these claims if this court grants certiorari on plaintiff's petition, i.e. 91-29.

---

[4] The cross petitioners make some reference to the issue of "taping" as showing no First Amendment activity. That issue, however, goes to the allegation of retaliation for communicating with defense counsel. These cross petitioners were granted qualified immunity with respect to that claim. That issue only applies to the City of Oklahoma City at the present time. That issue may become applicable to these defendants only if the court grants the petition for certiorari in plaintiff's case, i.e. 91-29.

Accordingly, the undersigned would submit that cross petitioners have not raised any independent basis for certiorari.

THE CROSS PETITIONERS HAVE NOT ASSERTED ANY BASIS TO GRANT THE CROSS PETITION ON THE ISSUE OF CAUSATION

Cross petitioners' final issue is that of causation. The only claim for which defendants in their individual capacity have liability at this time is on the First Amendment claim alleging retaliation for plaintiff's trial testimony.

At the outset it must be noted that cross petitioners did not preserve this matter below. That is, they neither submitted their own instruction on causation nor objected to the instructions given. They raised the issue for the first time on appeal. Therefore, they should not be permitted to urge this matter to the court[5].

The law is clear that if an individual defendant participates in, acquiesces in, or condones the deprivation of constitutional rights, then that individual properly held accountable, see e.g. *Rizzo v. Goode*, 423 U.S. 362 (1976), *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979), *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980), *cert denied* 449 U.S. 1016 (1980).

---

[5] In this regard, it should be noted that cross petitioners' assertion of an independent cause which breaks the causal connection was not even raised before the Tenth Circuit.

In these circumstances, it is respectfully submitted, the cross petitioner has failed to state a basis for this court granting certiorari.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the cross petition for certiorari in this case should be denied.

Respectfully submitted,

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahaoma City, OK 73118
(405) 848-0111
Attorneys for Respondent

*Counsel of Record